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Supreme Court of the United States

OCTOBER TERM 1973

No. 73-235

MARCO DEFUNIS, et al., *Petitioners*,

vs.

CHARLES ODEGAARD, et al., *Respondents*.

BRIEF OF AMICI CURIAE

The Mexican American Legal Defense and Educational Fund; the Puerto Rican Legal Defense and Education Fund; the American Civil Liberties Union; the American G.I. Forum; Aspira of America, Inc.; IMAGE; the League of United Latin American Citizens; the Puerto Rican Bar Association, Inc.; the Puerto Rican Law Students Association, Inc.; the Hispanic Association of Spanish-Surnamed Americans; the La Raza National Lawyers' Association; the La Raza National Law Students Association.

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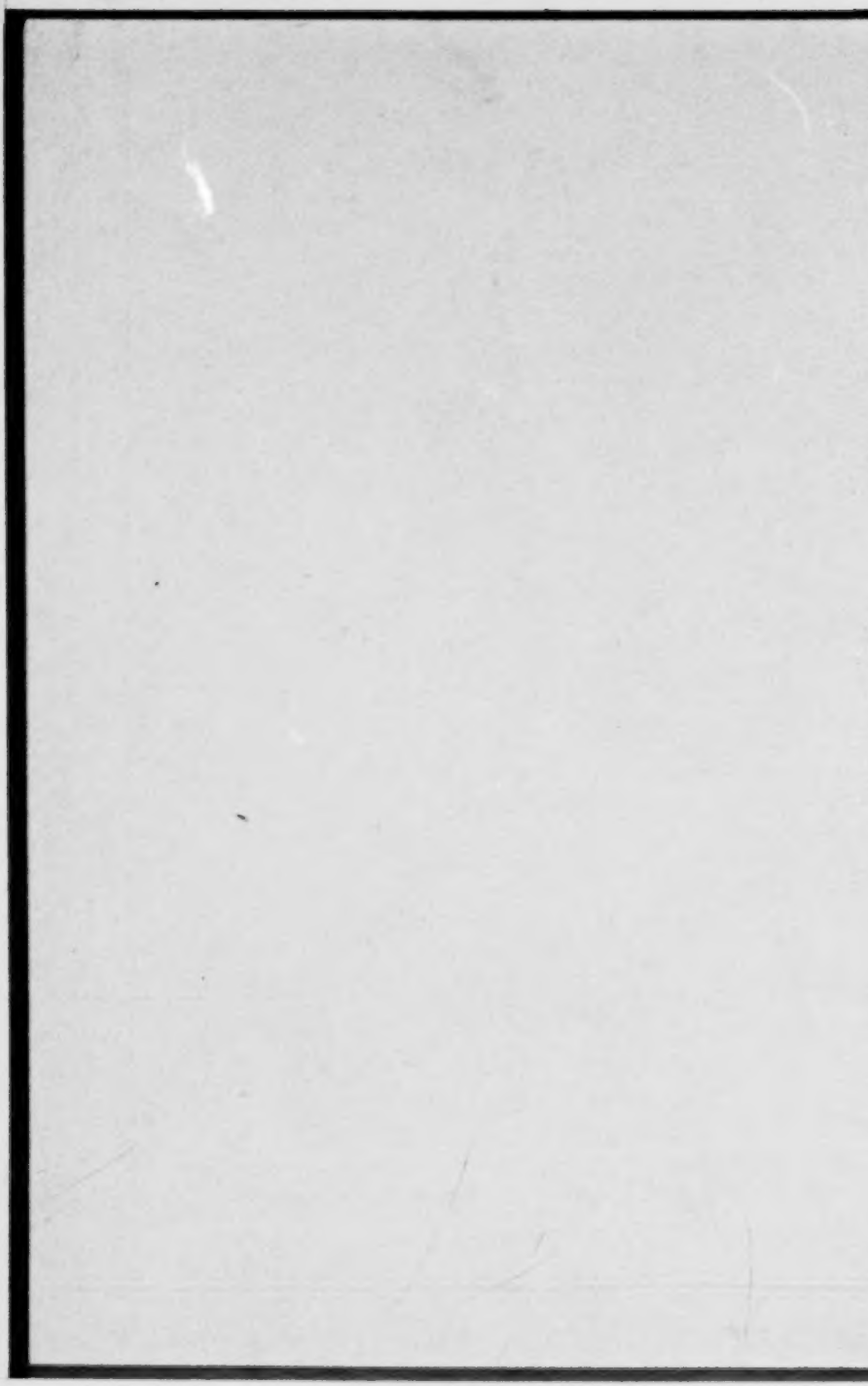

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INTEREST OF AMICI CURIAE[1]

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to secure the civil rights of Mexican Americans through litigation and education. It is headquartered in San Francisco with additional offices

[1]Letters of consent from both petitioners and respondents have been filed with the Clerk.

in San Antonio, Los Angeles, Denver, Albuquerque and Washington, D.C. A major goal of the organization has been increasing the numbers of lawyers who are Mexican Americans.

The Puerto Rican Legal Defense and Education Fund was established in February 18, 1972, primarily to secure the civil rights of Puerto Ricans through litigation and education. It is headquartered in New York. A major goal of the organization has been increasing the numbers of lawyers who are Puerto Ricans.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization dedicated to defending the right of all persons to equal protection under the law. The ACLU has been particularly concerned with the pervasive effects of racial discrimination on American society. It is ACLU policy that:

> . . . In order to achieve genuine equality of educational opportunity colleges should apply, in respect to persons who are members of disadvantaged groups and who previously have been denied opportunity for equal educational advantage, standards and methods of evaluating applicants different from those used with other applicants, as long as these standards and methods are reasonably designed to increase equality of educational opportunity. Massive compensatory programs for educationally deprived students should be simultaneously instituted. (Enacted by the ACLU Board of Directors, December 5-6, 1970).

The American G.I. Forum is an organization composed primarily of Mexican Americans who, at the

time of its founding after World War II, saw the need to end the discriminatory social, economic and political practices which at that time pervaded this country. Although many of these practices may be considered to have become somewhat alleviated today, they are by no means eliminated. One of the principal goals of the G.I. Forum is the improvement of the educational opportunities of Latinos, particularly in higher education where, because they were almost categorically excluded, their present numbers are wholly inadequate. For this reason, the G.I. Forum strongly supports affirmative admissions programs that are designed to correct prior imbalances.

Aspira of America, Inc. is a nation-wide organization of Puerto Rican educators and students, established for the purpose of securing equal education opportunity for Puerto Ricans and other Latinos.

IMAGE is a national organization of Latinos, established for the purpose of seeking justice and equality for the Spanish speaking. The principal thrust of its program concerns government employment for the Spanish speaking. One of the principal arenas in which IMAGE seeks to implement its goals is in education, where the vestiges of past discrimination can only begin to be remedied by minority admissions programs such as the ones under scrutiny in this case.

The League of United Latin American Citizens (LULAC) is a social and cultural organization of Latinos with a nationwide membership. A primary goal for LULAC has long been to seek an end to discriminatory practices in education, a fight which

it first took up in the 1920's when it sought to end segregation in Texas schools.

The Puerto Rican Bar Association, Inc., is a membership corporation made up of attorneys who seek to promote legal reform and facilitate the administration of justice while educating Puerto Rican people with regard to the law. The Association believes that its purposes can only be carried out by increasing the number of judges and attorneys of Puerto Rican extraction, a goal which is integrally related to the issues raised in the instant litigation.

The Puerto Rican Law Students Association, Inc., is an organization composed of law students of Puerto Rican extraction. One of the principal purposes of the Association is to encourage, advise and assist Puerto Ricans in their attempts to gain entrance and maintain academic standing in law schools throughout the country. The determination of the issues raised in this case will have a substantial effect on the Association's purpose.

The Raza Association of Spanish-Surnamed Americans (RASSA) is a national organization of Spanish-speaking persons who are strongly committed to an affirmative stand on the need to remove the scars of past discrimination in education, a practice which effectively served to bar the Spanish-speaking from virtually all professions particularly the legal profession.

The La Raza National Lawyers' Association is a national bar association founded for the purpose of providing a forum for communication among attor-

neys who want to promote the social, educational and civic advancement of Spanish-speaking communities. Included among their specific goals is to file Amicus Curiae briefs in order to educate the bench to needs of the Spanish-speaking communities.

The La Raza National Law Students Association is a national organization of Spanish-speaking students currently enrolled in law schools throughout the country. Because this case is one which bears on the very future of Chicanos within the legal profession, the La Raza National Law Students Association considers it one of their most important and pressing functions to participate in the sustainment of a program which attempts, even if in limited form, to compensate for the discriminatory practices which for so long kept Latinos from higher and professional education.

INTRODUCTION AND SUMMARY

This brief is submitted on behalf of the country's major Latino civil rights and legal organizations, and the American Civil Liberties Union. This alliance has been formed for the specific purpose of providing the Court with additional information and argument in the instant case, which these amici curiae believe to be one of the most important civil rights cases to come before the Court since *Brown v. Board of Education*, 347 U.S. 483 (1954).

Both legally and factually, the instant case is the reverse of *Brown* and its progeny. Appreciation of

this fact and framework is essential to the proper resolution of the instant case.

In *Brown* and its progeny, the plaintiffs were members of certain racial and ethnic minority groups, *e.g.*, blacks and Latinos, each of which "constitute[s] an identifiable class for purposes of the Fourteenth Amendment." *Keyes v. School Dist. No. 1, Denver*, 93 S.Ct. 2686, 2691 (1973). Marco DeFunis, Jr., is not a member of any group that has been found to be so constitutionally "identifiable"; he is an Anglo, *i.e.*, a member of the majority group.

In *Brown* and its progeny, representatives of constitutionally "identifiable" minority groups asked the courts to find that they have been the victims of unlawful discrimination, *i.e.*, racial and ethnic segregation in public schools, and to fashion appropriate remedies to eliminate this discrimination and its effects. *E.g., Keyes v. School Board Dist. No. 1, Denver, supra; Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). Thus the courts invalidated governmental programs that had both the purpose and effect of discriminating against and perpetuating the pervasive and historical deprivation of constitutionally "identifiable" minority groups. In the instant case, an Anglo has asked the courts to find that he has been the victim of unlawful discrimination, *i.e.*, exclusion from a state law school because of purposeful inclusion of members of constitutionally "identifiable" minority groups who have (strictly) academic admissions' credentials that are ostensibly inferior to his; and he has asked the courts to enjoin this discrimination.

Thus, this case presents the Court with its first opportunity to pass upon the constitutionality of a governmental "affirmative action" program, formulated and executed by a non-judicial body, that "discriminates" in favor of historically disadvantaged racial and ethnic minority groups. The Court should take this opportunity to clarify the constitutional principle of equality, and rule that government is not barred from recognizing race and ethnicity in designing programs to eliminate from our society, "root and branch", the pervasive and historic deprivations suffered by members of these minority groups. *Cf., Green v. County School Bd. of New Kent County,* 391 U.S. 430, 437-38 (1968).

Amici curiae do not in this brief present an exhaustive argument on the constitutional issues, and they do not presume to answer all of the arguments presented on behalf of the petitioners. It is the purpose of this brief to assist the Court by showing that the respondents' affirmative action minority admission program is fully consistent with the admissions programs of virtually all accredited law schools. We also present a summary of some of the legislative facts[2] revealing the relationship between the severe discrimination and deprivation suffered by the Latino minorities in the United States and the critical shortage of Latino law students and lawyers.[3] Finally,

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[2]On the differences between adjudicative and legislative facts, see, *e.g.*, Karst, *Legislative Facts in Constitutional Litigation,* 1960 SUP. CT. REV. 75.

[3]We anticipate that other amici and the respondents will provide such information concerning blacks and other constitutionally "identifiable" racial and ethnic minorities

we undertake to demonstrate that the decision of the Supreme Court of the State of Washington, sustaining the University of Washington's affirmative action program for the admission of law students who are minority group members, is wholly consistent with the principles of constitutional law articulated by this Court in *Brown* and its progeny, as well as in other decisions. Basically, we take the position that the petitioners and the amici curiae who support them simply have misunderstood the constitutional principle of equality, as well as the pertinent judicial precedents, including those that have already validated affirmative action programs.[4] Thus, the Supreme Court of the State of Washington was perfectly correct in ruling that the respondents' actions are constitutional.[5]

ARGUMENT

I

THE FACTS IN THIS CASE REVEAL THAT THE RESPONDENT MARCO DeFUNIS, JR., WAS DENIED ADMISSION TO THE UNIVERSITY OF WASHINGTON SCHOOL OF LAW PURSUANT TO ADMISSIONS POLICIES AND PROCEDURES THAT ARE VALID IN THAT THEY ARE WHOLLY CONSISTENT WITH THE ADMISSIONS POLICIES AND PROCEDURES AT MOST ACCREDITED LAW SCHOOLS.

Marco DeFunis, Jr., was twice denied admission to the University of Washington School of Law even

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[4]See notably, the briefs amicus curiae of the Anti-Defamation League of B'nai B'rith and of the American Jewish Congress.

[5]The opinion of the Supreme Court of the State of Washington is reported at 82 Wn.2d 11, 507 P.2d 1169 (1973).

though his strictly academic credentials yielded a mathematically projected first year average (PFYA) that was superior to those projected for a substantial number of students who were admitted. (They were also inferior to those of a large number of applicants who also were not admitted.) Many of these students were members of racial and ethnic minority groups. Significantly, however, many of these students were not minority group members. As the court below found:

> Because of the judgmental factor in the [Law School's] admission process . . . the ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of PFYAs. Of those invited, 74 had lower PFYAs than plaintiff; 36 of those were minority applicants; 22 were returning from military service; and 16 were applicants judged by the [admission] committee as deserving invitation on the basis of other information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's were denied admission. Of the 36 minority group students invited 18 actually enrolled in the first-year class.
>
> 507 P.2d at 1176. *Accord:* Appendix at 50.

Suffice it to say, special consideration was given to the applications of minority group students; students *apparently* less qualified than the petitioner, Marco DeFunis, Jr., in that their strictly academic credentials apparently were not as good as his, were admitted to the law school largely because they were members of minority groups. However, many of these minority group students were first screened through

special compensatory summer programs, operated primarily by the Council on Legal Education Opportunity. 507 P.2d at 1176 n. 5. Further, other students who are not minority group members but who were also *apparently* less qualified than petitioner, Marco DeFunis, Jr., were also admitted.

The admissions criteria and procedures employed by the respondents are fully described in the opinion of the court below and need not be elaborated in this brief. They appear to be very complex. This is not surprising. Law school admissions are a complicated process. See *e.g.*, Goolsby, *A Study of the Criteria for Legal Education and Admission to the Bar,* 20 J. LEGAL ED. 175 (1968); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L. J. 699 (1971) [hereinafter, O'Neil, 80 YALE L. J. at .....]; O'Neil, *Preferential Admissions: Equalizing Access to Legal Education,* 1970 TOLEDO L. REV. 281 [hereinafter, O'Neil, 1970 TOLEDO L. REV., at .....]. Decisions regarding admission simply are not made at law schools accredited by the American Bar Association and the Association of American Law Schools on the basis of a mechanical rank-order which is determined by evaluation only of traditional academic credentials, *i.e.*, college grade point average and Law School Admission Test score. The admissions process is archetypical of those decision-making processes described by Professor Fuller as polycentric. The factors involved are so many and diffuse that these decisions are generally unsuited for adjudication; they also cannot be resolved satisfactorily by wholly mechanical or random

approaches. Sensitive, relatively discretionary processes, rather like enterprise management, are required. Fuller, *Collective Bargaining and The Arbitrator,* 1963 WISC. L. REV. 3.

Thus, the criteria and procedures applied by the University of Washington's School of Law admissions committee are subtle and multifaceted. But they do not differ in this respect from those applied by virtually every law school in the country accredited by the ABA or the AALS. See, *e.g.,* O'Neil, 80 YALE L. J. 699 (1971); O'Neil 1970 TOLEDO L. REV. 281.

The criteria employed by the respondents when this lawsuit commenced were publicly stated. While we could quibble with their formulation, they are reasonably clearly defined, to the extent that any such criteria can be clearly defined:

> In assessing applications, we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large.
>
> We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

> An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.
>
> We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions.

(Defendants' Exh. 45.)

It is beyond dispute that use of criteria in addition to strict academic credentials is appropriate if a humanistic influence is to be employed in the law school admissions process. Indeed, given the lack of precision of the traditional academic credentials as predictors of performance in law school, the likelihood that they are culturally biased and not validated, and their tendency to over-exclude minority group members,[6] resort to additional criteria or to affirmative action admissions programs may well be obligatory. That issue, however, is not before the Court. As the Supreme Court of the State of Washington ruled:

> . . . [T]he question before us is not whether the Fourteenth Amendment *requires* the law school to take affirmative action to eliminate the con-

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[6]See, e.g., O'Neil, 1970 TOLEDO L. REV. 281; O'Neil, 80 YALE L. J. 699 (1971); Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 TOLEDO L. REV. 321 [hereinafter, Rosen, 1970 TOLEDO L. REV. at .....].

> tinuing effects of de facto segregation; the question is whether the Constitution *permits* the law school to remedy racial imbalance through its minority admissions policy.

507 P.2d at 1183.[7]

Like the University of Washington School of Law, most accredited law schools attempt to select students on the basis of predications indicating not only that they will get good grades in law school but also that they will "make significant contributions [both] to law school classes and to the community at large." To assure that students have the service potential, law schools apply all manner of "non-academic" considerations in admissions.

Residency, for example, is a common non-academic criterion. So-called national law schools frequently prefer applicants from outlying states over applicants residing or attending school in states located near the given law school, thereby better serving the national "community." On the other hand, many other law schools, especially state law schools, are required by statute or regents' rules to favor state residents, thereby better serving the state's "community." State law schools in turn frequently favor applicants from rural areas of the state over those from the cities. As a justification for using varying standards for

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[7]The validity of traditional academic admissions criteria also need not be reviewed by this Court. See 507 P.2d at 1183 n. 13. If these questions were to be decided, the Law School Admissions Test and law school testing procedures might well not pass muster under standards such as those articulated by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

admitting law students from different parts of the state, law schools cite the need for geographical diversity. Relative to population in various areas of the state, law schools receive fewer applications from rural residents than from urban dwellers. Hence, they are less rigorous in applying traditional academic criteria to rural applicants, thereby preferring them for admission. The law schools believe that this kind of a "preferential" approach best serves the entire state and all of its communities, by increasing the likelihood that rural areas will be adequately staffed with lawyers. See generally, O'Neil, *supra*, 80 YALE L. J. at 703-05.

The University of Washington School of Law's Guide for Applicants states that "An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions." (Defendants' Exh. 45.) This approach is well within the parameters of nearly universal law school admissions policies. At present, virtually all of the ABA and AALS accredited law schools in the United States consider such racial and ethnic factors in making admissions decisions. In fact, they clearly tend to favor applicants from disadvantaged racial and ethnic minority groups over other applicants. See, *e.g.*, Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1069; Rosen, 1970 TOLEDO L. REV. at 326; *The Law Schools and the Minority Group Law Students, A Survey for the Association of American Law Schools Committee on Minority Groups*, PROCEEDINGS OF THE 1970 ANNUAL

MEETING OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, §II, p. 1. The reasons for use of such racial and ethnic criteria are almost precisely the same as the reasons for application of criteria relating to residency. The law schools are seeking to admit and train a diverse group of students who will be able "to make significant contributions to law school classes and to the community at large."

By applying racial and ethnic criteria, law schools (and the organized bar) are now recognizing that ghettos, *barrios*[8] and minority group communities, wherever they are found, are grossly underserved by the law schools and the legal profession.[9] Similarly, just as relatively few applications are received from dwellers in the rural portions of a state compared to the rural population, relatively few applications are received from members of the minority group communities. Law schools are also recognizing that the effect of rigid application of traditional academic admissions criteria clearly is to over-exclude from law schools members of constitutionally identifiable minority groups. *See, e.g.*, Consalus, *The Law School Admission Test*, 1970 TOLEDO L. REV. 501. Finally, there is now a great deal more than a suspicion that these criteria are either culturally biased or insuffi-

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[8]*Barrio* is a Spanish word denoting a predominantly Mexican American, Puerto Rican or Latino area analogous to a ghetto. See, *e.g., White v. Regester*, 93 S.Ct. 2332, 2340-41 (1973).

[9]In addition to what follows in this brief, extensive data are provided in Gellhorn, *The Law School and the Negro, supra*, and Symposium, 1970 TOLEDO L. REV. 277-986. These materials also canvass the reasons for and the consequences of this paucity of minority group lawyers.

ciently validated to justify exclusive reliance upon them, especially in view of the deprivations and discrimination generally imposed by our society on minority groups and their members. *See, e.g.*, Rosen, 1970 TOLEDO L. REV. at 322-336.

On the facts, then, the respondents' minority admission program is archetypical of, and fully consistent with, the admissions processes extant at virtually all accredited law schools.

II

THE COURT BELOW PROPERLY SUSTAINED THE RESPONDENTS' AFFIRMATIVE ACTION PROGRAM FOR MINORITY GROUP ADMISSIONS ON THE BASIS OF THE CLEAR FACTS OF THE PERVASIVE AND HISTORIC DISCRIMINATION AND DEPRIVATION THAT CONSTITUTIONALLY IDENTIFIABLE RACIAL AND ETHNIC MINORITIES CONTINUE TO SUFFER AND THE RELATIONSHIP BETWEEN THIS DISCRIMINATION AND THE CRITICAL SHORTAGE OF MEMBERS OF THESE MINORITY GROUPS IN THE LEGAL PROFESSION.

The sordid history of the origins of black immigration to the United States need not be recited here. The continued deprivations suffered to this day by blacks are familiar enough to this Court. They are the primary subject of *Brown v. Board of Education* and its progeny. Suffice it to say, within the legal profession, the imbalance against blacks is as deplorable as it is within any of the significant institutions of our society. Further, the relationship between this imbalance, and discrimination and deprivation suffered by blacks throughout society is patent. See, *e.g.*,

Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1069.

The history of the discrimination and deprivations suffered by Latinos has been brought much less frequently to the attention of this Court.[10] Although the Court has recently had occasion to address the facts of this deprivation,[11] additional recitation is appropriate.

According to the United States census, there are at least 10.6 million "persons of Spanish origin" in the United States. There may well be a larger number of such persons, for there is considerable evidence that this class was grossly undercounted in the 1970 census. Indeed, the 10.6 million figure was arrived at as a correction by the government of its first estimate of 9.2 million.[12] Even accepting the government's present count, Latinos constitute the second largest

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[10]Several of the amici curiae supporting the petitioners have intimated that the record is devoid of evidence of these "legislative" facts, and there are no materials outside the record bearing upon these facts that might be suitable for judicial notice. See, *e.g., Brief of the Anti-Defamation League of B'nai B'rith as Amicus Curiae*, pp. 10-13. We disagree with this assessment of the record. Further, we submit that the facts of racial and ethnic deprivation, the continued racial and ethnic imbalance in the legal profession, and the relationship between the two are sufficiently notorious for the courts to take judicial notice of them. See *Ho Ah Kow v. Nunan*, 12 Fed. Case. 252, 255 (No. 6546) (C.D.C. Cal. 1879) (Field, J.). Such facts were considered, of course, in *Brown v. Board of Education*, 347 U.S. 483 (1954). See, Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421 (1960).

[11]*E.g., Keyes v. School Dist. No. 1, Denver*, 93 S.Ct. 2686 (1973); *White v. Regester*, 93 S.Ct. 2332 (1973); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[12]United States Dep't of Commerce, *Current Population Characteristics, Persons of Spanish Origin in the United States: March 1973 (Advance Report)*, Series P-20 No. 259, Jan. 1974.

minority in the United States subject to historic and pervasive patterns of segregation and invidious discrimination.

According to the census there are four major groups of "persons of Spanish origin" in this country: Mexican Americans or Chicanos (6.3 million), Puerto Ricans or Boricuas (1.5 million), Cubans (0.7 million) and persons of "Central or South American or other Spanish origin" (2.0 million). Within the total group of Latinos, Chicanos and Boricuas have suffered most from segregation and discrimination.

Mexican Americans comprise the largest minority west of the Mississippi River; they are settled predominantly in the Western part of the United States, with large population centers from Chicago to San Francisco. They are most numerous in the Southwest, comprising Arizona, California, Colorado, New Mexico and Texas. In fact, they have lived in the Southwest for over 400 years. During the 1500's the Spanish began to settle this area. At the time Jamestown was settled in 1607, Santa Fe, New Mexico, had already been functioning as the capital of the Spanish territory of Nuevo Santander for twenty years.

The territory comprising the Southwestern states passed from Spanish rule to Mexican sovereignty in 1821, when Mexico declared its independence from Spain. Severe internal problems resulted in the secession of Texas from Mexico, by means of a rebellion or civil war, in 1836. Nearly a decade later, although Texas' independence was still in contest, the United States Congress authorized the admission of Texas

into the Union. Armed conflict ensued between Mexico and the United States culminating in the War of 1846 which was won by the United States.

Following the War, the United States annexed half of Mexico's total territory including Texas and the remainder of the Southwest, the territory from which the States of California, Arizona, Colorado and New Mexico are derived. The Treaty of Guadalupe Hidalgo, signed on February 2, 1848, codified the annexation of the Southwestern lands. Technically the Treaty, by protocol, guaranteed both the civil and property rights of those former citizens of Mexico, residing in the annexed territories, who agreed to become United States citizens. Not surprisingly, however, in actual operation the Treaty failed to protect Chicanos. After the War of 1846, they fell victim to all of the misfortunes endured by a conquered people. They enjoyed few advantages of United States citizenship, and they were placed behind the Anglos in all realms of social, economic and political activity.

Following the War of 1846, approximately 75,000 Mexicanos chose to receive United States citizenship. Their numbers have been augmented by additional immigrants from Mexico, who entered in three major waves.

First, around the turn of the century, a relatively small number of immigrants came to work in mining, railroad construction and other such laboring fields.[13]

[13]Grebler, Moore & Guzmán, THE MEXICAN AMERICAN PEOPLE (1970), p. 63.

Immigrants from Asia supplied most of the labor employed in Southwestern agriculture at that time.

Second, the largest wave of Mexican immigration to this country occurred during the turmoil of the Mexican revolution, commencing around 1908. These immigrants and their descendants provided the population base for most present day Mexican American communities in the Southwest.[14] Immigrants were also drawn to the United States by the prosperity of the 1920's. However, they were funneled into farm labor work as the supply of Asian labor diminished.[15] During this period, Mexicans comprised nearly 10% of the legal migration to the United States.[16] The number of illegal immigrants that entered during this prosperous period of American history will never be known.

During the depression immigration decreased drastically. In addition, persons of Mexican descent, citizens as well as aliens, were brutally repatriated to Mexico. Cattle cars rolled out of the midwest and all parts of the Southwest ladened with human cargo. Many United States citizens of Mexican descent died on the parched deserts of Northern Mexico, while others were to return years later to their homes and families in their native United States.[17]

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[14]Meier & Rivera, THE CHICANOS: A HISTORY OF MEXICAN AMERICANS, p. 135.

[15]*Mexicans in California*, Report of Governor C. C. Young's Mexican Fact-finding Committee 1930 (Reprint, San Francisco, California 1970) p. 171.

[16]Grebler, *et al.*, *supra*, note 13, p. 64.

[17]See C. McWilliams, NORTH FROM MEXICO (1948).

Third, the 1950's once again saw a massive increase of emigration from Mexico to this country. In the second half of the 1950's nearly 15% of all legal immigrants to the United States came from Mexico.[18] In addition, Congress reinstituted the "bracero" program at the urging of the agricultural interests, causing a great increase in temporary migrations.[19] However, the same conditions which prompted use of "braceros" —low wages, poor working conditions, inadequate housing—made it attractive for American farmers to hire illegal aliens. As a result, there was also a flood of illegal aliens. The Immigration and Naturalization Service reported that, in the early 1950's, 3.8 million illegal Mexican aliens were expelled from the United States.[20] The number of illegal aliens who remained in the United States, during this period, will never be known; nor will the number of citizen offspring born to the illegal aliens.

For obvious historic reasons and because of their proximity to the border, the five states taken by conquest from Mexico have absorbed most Mexican Americans. More recently, however, Mexican Americans have migrated north to midwestern cities in search of work. Consequently, there are over 200,000 Chicanos now residing in, for example, Chicago, Illinois and Lansing, Michigan.

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[18]Grebler, *et al.*, *supra*, note 13, p. 67.

[19]The bracero program under Public Law 78 allowed contract labor to be brought from Mexico to the United States to do farm work during the appropriate growing and harvesting seasons.

[20]Grebler, *et al.*, *supra*, note 13, p. 521.

In many respects the background of Puerto Rican migration to the mainland United States is similar to that of Mexican Americans. Nearly a century before the settlement of Jamestown, Spanish settlers were building a cathedral in San Juan. And Puerto Ricans, too, became subject to the United States sovereignty as a result of a war. The Island of Puerto Rico was ceded by Spain to the United States in 1898 as one of the spoils of the Spanish-American War.

In 1917, the Jones Act, 48 U.S.C. § 731, *et seq.*, declared that all residents of Puerto Rico are citizens of the United States. Puerto Rico now has commonwealth status with the United States. *See,* e.g., Cabranes, *The Status of Puerto Rico,* 16 INT'L & COMP. L. Q. 531 (1967). Consistent with the concept of United States citizenship, residents of Puerto Rico have the right to travel freely to and from the United States and to settle here. *Balzac v. Porto Rico,* 258 U.S. 298 (1922). The other rights and benefits of United States citizenship, mandated by the Constitution and federal statutes, notoriously have not been freely enjoyed by Puerto Rican residents of the United States.

Large numbers of Puerto Ricans have, however, migrated from Puerto Rico to the United States. The reasons for the migration are very similar to those leading to the immigration of Mexican Americans during the Twentieth Century. By and large these Puerto Ricans were seeking jobs and an improved standard of living.

The major migration of Puerto Ricans has taken place in recent years. For example, between 1950 and 1960 nearly 400,000 persons migrated from Puerto Rico to the United States.[21] As a result, there are presently an estimated one and one-half million to two million Puerto Ricans residing in this country. Of these, slightly over one million are in New York, the disembarking place for Puerto Ricans since migration began. There are, however, significant and growing numbers of Puerto Ricans in Connecticut, Massachusetts, New Jersey, Pennsylvania, Illinois, and Florida.

If these large masses of Latino people had become integrated into American society as had ethnic groups from Europe, they would be entitled to no special standing under the Equal Protection provisions of the United States Constitution. As a *class* they would not continue to be subjected to pervasive and invidious discrimination. See Point III, *infra*.

For many reasons, however, Mexican Americans, Puerto Ricans and other Latinos have remained outside of the American "Melting Pot," and continue as a class to be subjected to pervasive discrimination. First, White America for its own reasons, perceives of and treats these peoples as though they were nonwhite. (One reason for this treatment may be the fact that the gene pool from which Mexican Americans, Puerto Ricans and other people from Latin

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[21] *Puerto Ricans in the United States, United States Census of 1960* PC 2; ID Table A, p. viii.

American descend includes American Indians and blacks as well as caucasians.)[22]

Second, there is a continuous infusion of Mexican and Puerto Rican culture into this country because of the high level of immigration from Mexico and of migration from Puerto Rico. Indeed, there is a constant migration back and forth between Puerto Rico and the United States, and the border between Mexico and the United States is extremely fluid.

Third, Mexican Americans have suffered the same type of social, economic and political discrimination as have blacks. Public schools have been segregated, *Keyes v. School Dist. No. 1, Denver,* 93 S.Ct. 2686, 2691-92 (1973); *Cisneros v. Corpus Christi I.S.D.,* 459 F.2d 13 (5th Cir. 1972); *Mendez v. Westminster,* 161 F.2d 774 (9th Cir. 1948). *See generally,* Comment, *Project Report: Segregation of Chicanos in Texas Schools,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 307 (1972). Political rights have been denied, *Graves v. Barnes,* 343 F. Supp. 704 (W.D. Tex. 1972), aff'd *sub nom., White v. Regester,* 93 S.Ct. 2332, 2340-41 (1973); *Castro v. State,* 2 Cal.3d 223, 85 Cal.Rptr. 20, 466 P.2d 244 (1970). Employment discrimination has been the rule. Social barriers were erected, perhaps epitomized by the separate washroom facilities described in *Hernandez v. Texas,* 347 U.S. 475 (1954).

Puerto Ricans suffer from precisely the same kinds of deprivations. See, *e.g., Katzenbach v. Morgan,* 384

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[22]See H. Driver, *Indians of North America* 602 (1961); Forbes, *Race and Color in Mexican-American Problems,* 16 J. HUM. REL. 57 (1968).

U.S. 641, 652-54 (1966). Indeed, by every socio-economic gauge, including the 1970 census, Puerto Ricans are the most deprived minority group in the United States. They are the least educated, the least employed, and the least paid. *See* Cabranes, *Careers in Law for Minorities: A Puerto Rican's Perspective on Recent Developments in Legal Education,* 25 J. LEGAL ED. 447, 449-51 (1973) [hereinafter, Cabranes, 25 J. LEGAL ED. at ——]. Not surprisingly, they are also the targets of severe discrimination in such areas as employment, voting rights, education, and housing. *E.g. Katzenbach v. Morgan, supra.*

Fourth, this discrimination has created insulated Mexican American communities in large cities such as San Antonio, see *White v. Regester, supra,* and Los Angeles;[23] it has created similar insulated Puerto Rican communities in several large Northeastern cities, such as New York, Newark and Boston. Even in the small towns the barrio tends to be isolated from the rest of the community.[24] This cultural isolation has fostered retention of the Spanish language, and Chicano and Puerto Rican cultures. Since children learn Spanish at home and do not socialize with English-speaking children at school, the need and opportunity to speak English is minimal.[25]

[23]One author has characterized the Mexican American's position in Los Angeles as follows: "Unassimilated, unwelcome, unprotected, these people were so thoroughly isolated that the American majority was able to maintain its untainted version of an integrated community." R. Fogelson, THE FRAGMENTED METROPOLIS: LOS ANGELES, 1850-1930 (1967).

[24]H. T. Manuel, THE EDUCATION OF MEXICAN AND SPANISH-SPEAKING CHILDREN IN TEXAS (1930) p. 18.

[25]P. Kibbe, LATIN AMERICANS IN TEXAS (1946) pp. 82-103.

Certainly as compared to most other ethnic groups, there is within the Chicano and Boricua communities a desire to maintain the use of the mother tongue. Examples of the continued desire to hold onto Spanish are the numerous television and radio stations broadcasting in Spanish throughout the country and the importation of Spanish language films.

With this history of constant immigration and migration, discrimination and isolation, the continued use of Spanish and retention of quite separate cultures, is understandable. A study conducted by the Mexican American Study Project at UCLA and later published in Grebler, *et al.*, THE MEXICAN AMERICAN PEOPLE, *supra*, n. 13, at 425, reported that almost half of the sample of low-income Mexican Americans in Los Angeles, and a greater percentage in San Antonio had trouble with English. According to one recent study, 72.1 percent of Puerto Ricans in the mainland United States speak Spanish as their first language.[26] Even in Minnesota, where there are few Latinos, Spanish is spoken.[27]

Although the need for legal representation of Latinos is clear, the problems they confront are compounded by the sparse number of Latino attorneys and judges in the United States. It has always been difficult to tabulate the precise number of Latino or Spanish-surnamed lawyers throughout the country. To

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[26]United States Dep't of Commerce Bureau of the Census; *Persons of Spanish origin in the United States;* November 1969 (Feb., 1971) p. 20.

[27]W. Moquín, A DOCUMENTARY HISTORY OF MEXICAN AMERICANS (1971) p. 330.

the best of our knowledge no national census has been published. However, a number of surveys have been conducted from which projections can be made. They reveal gross underrepresentation of Latinos at all levels of the legal profession.

One survey, based upon the 1968 Northern and Southern California Legal Directories, indicated that there were only 228 Spanish surnamed attorneys in the State of California, constituting merely one percent of the state's 29,409 licensed attorneys. "The ratio of Anglo Attorneys to Anglo citizens was 1 to 530, while the ratio of Spanish-surnamed attorneys to Spanish-surnamed citizens was 1 to 9,482." Reynoso, *et al., La Raza, the Law and the Law Schools,* 1970 TOLEDO L. REV. 809, 816 (footnote omitted). In 1967 at least ten percent of the population of the City and County of Denver was Latino. "Yet only ten of the 2,000 attorneys practicing there (one half of one percent) have Spanish surnames. . . ." O'Neil, 1970 TOLEDO L. REV. at 298; O'Neil, 80 YALE L. J. at 727 (1971). According to a 1973 survey taken by the Puerto Rican Legal Defense & Education Fund, there are approximately three Puerto Rican practicing attorneys in Pennsylvania, five in New Jersey, three in Connecticut, three in Illinois, sixty in New York, and one in Massachusetts. *See* Cabranes, *supra,* 25 J. LEGAL ED. at 449-50.

The figures for Latino representation on the judiciary are equally bleak. In the mainland United States, there are only two or three federal judges who are Spanish surnamed. One is Mexican Ameri-

can, and none is Puerto Rican. The same pattern is repeated in the state judiciary. In 1970, the United States Civil Rights Commission reported that:

> Of the total of 961 judges serving on State courts in the five States [of the Southwest when Chicanos constitute 15% or more of the population] only 32 or 3.0 percent are Spanish surnamed. There are 32 supreme court justices in the five States. Only one of these, the chief justice of New Mexico, is Spanish surnamed.
>
> At the State court trial level, there are a total of 746 judges; 26 are Spanish surnamed. California has seven, Colorado three, New Mexico 14, Texas two, Arizona none.

Mexican Americans and the Administration of Justice in the Southwest: A Report of the United States Commission on Civil Rights, March 1970, p. 84.

Recently, there has been notable increase in the number of Latino lawyers, and some increase in the numbers of Latino judges. These increases have not been so great as to bring the percentages of Latino lawyers and judges even reasonably close to parity in relation to the percentage of Latinos in the general population. These increases have resulted in large part from the recent movement within the law schools of the mainland United States to increase their enrollment of law students who are members of historically deprived minority groups. The number of Chicano law students in 1973-74 has tripled since 1969-70, the number of Boricua law students has also tripled, and the number of other Latino law students has

more than quadrupled. Thus, currently there are 1,259 Chicanos, 180 Boricuas, and 261 other Latino law students enrolled in the accredited law schools of the mainland United States.[28] On the other hand, the total number of law students enrolled in 1973-74 has almost doubled since 1969-70 to a figure of 106,102.[29] Hence the relative proportion of Latino law students has less than doubled since 1969. It now stands at approximately one and one-half percent, although Latinos constitute over five percent of the United States' population.

The facts are clear: a critical racial and ethnic imbalance continues throughout the entire legal profession. We do not suggest that the legal profession must reflect absolute parity with the general population. However, continuation of the existing gross imbalance has deleterious effects on both minority groups and their members, and society as a whole. Thus there are compelling reasons for taking affirmative steps to reduce this imbalance as rapidly as possible. And it was for these reasons that the Supreme Court of the State of Washington upheld the respondents' affirmative action program. 507 P.2d at 1182-84.

These programs are constitutional because they are necessary to secure the rights of individual Latinos, and members of other minorities, who belong to classes

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[28] *1973 Survey of Minority Group Students in Legal Education*, collected by Millard H. Ruud, then Consultant on Legal Education to the American Bar Association, which is attached to this brief as Appendix A.

[29] See *Legal Education and Bar Admission Statistics* 1963-1973, attached to this brief as Appendix B.

that historically have been subject to gross and comprehensive discrimination and deprivations. The vast majority of people belonging to these minority groups have systematically been denied equal educational opportunity, and otherwise have suffered great deprivations. It simply is not right to judge such applicants solely by the traditional admissions criteria, such as college grade point average and Law School Admission Test score, especially since the traditional admissions criteria have not been validated, and they are probably culturally biased. To do justice to individual minority group members, therefore, it follows that this Court should validate the respondents' good faith program to evaluate minority group applicants on alternative bases.

Additional reasons why government has a compelling interest in increasing the number of lawyers from historically deprived minority groups have been well stated by Professor O'Neil. "First, all surveys of the need for counsel confirm that poor people—of whom minority groups constitute a disproportionate share—find legal services inaccessible, inadequate, and inhospitable." O'Neil, 1970 TOLEDO L. REV. at 296-97. Indeed, one of the most direct and immediate impacts of the absence of Latino lawyers is on the Latino communities. We do not, of course, suggest that no Anglo lawyers are willing or capable of assisting minority group members, that all minority group lawyers are willing or able to donate or use their time or otherwise work to remedy the conditions of the poor and oppressed, or that we should expect all minority

group lawyers to so employ themselves. However, especially in those portions of the community where minority group members most need legal assistance, "particularly where the case is a controversial one or is potentially divisive along racial lines, white attorneys may be neither able nor willing to take it on even if they are practicing in the area and ready to handle some legal problems of the" minority community. O'Neil, 1970 TOLEDO L. REV. at 297.

Even when Anglo lawyers are able and willing to represent minority group members,

> . . . the white or Anglo lawyer is far less likely than the man who comes from the ghetto or the barrio to understand the background of the case, to be able to locate and interview witnesses, to gather material evidence within the community, and so on. Certain tasks can be performed best (and sometimes only) by one who knows the community and its people.

O'Neil, 1970 TOLEDO L. REV. at 297.

Especially when a lawyer is called upon to deal with members of Latino communities, frequently it is important that the lawyer himself be a member of that community.

> The client's ability to communicate freely and fully with his attorney is as vital as the actual availability of an attorney. Clearly racial or ethnic identity between lawyer and client will enhance or promote such communication. Where the client's basic tongue is Spanish, the advantage of an attorney fluent in that language is plainly apparent.

O'Neil, 1970 TOLEDO L. REV. at 297-98.

Thus as litigants and clients, members of the Latino communities, the vast majority of whom speak Spanish as their first or only tongue, need access to lawyers with whom they can communicate. All too often, non-English speaking Latinos have no lawyers available to explain to them their rights and duties under the law. This language problem in legal proceedings has gained increased recognition in the courts. See, *e.g., United States ex rel. Negrón v. New York,* 434 F.2d 386 (2d Cir. 1970); *Ex parte Muraviov,* 192 Cal.App.2d 604, 13 Cal.Rptr. 466 (1961); *State v. Vásquez,* 101 Utah 444, 121 P.2d 903 (1942).[30]

Apart from the needs of individual Latino litigants and clients for increased numbers of Latino lawyers, there are additional societal needs to be considered. Participation of Latino lawyers in the resolution of legal disputes in which the Latino communities have an interest makes both realistic solutions and the acceptibility of those solutions by the Latino communities more likely. Further, additional Latino lawyers

[30]In addition, numerous courts have now also ordered election officials to provide information in languages other than English, *E.g., López v. Dinkins,* No. 73 Civ. 695, ... F. Supp. ..... (S.D. N.Y. March 21, 1973); *Puerto Rican Organization for Political Action v. Kusper,* 350 F. Supp. 606 (N.D. Ill. 1972), aff'd, ... F.2d ..... (7th Cir. Dec. 18, 1973, No. 73-1035); *Castro v. State,* 2 Cal.2d 223, 85 Cal.Rptr. 20, 466 P.2d 244 (1970). In its present Term, this Court ruled that San Francisco's failure to provide bilingual education to students of Chinese ancestry who do not speak English denies them a meaningful opportunity to participate in public education and thus violates Title VI of the Civil Rights Act of 1964. *Lau v. Nichols,* ..... U.S. ....., 42 U.S. L. WEEK 4165 (No. 72-6520, Jan. 21, 1974). See *Serna v. Portales Municipal Schools,* 351 F. Supp. 1279 (D.N.M. 1972), on appeal to the 10th Cir. No. 73-1737 (where the district court reached a *Lau* result under the Fourteenth Amendment).

would make important intellectual contributions to the legal profession and provide the profession with valuable input concerning their communities' needs and perspectives. "Lawyers exercise disproportionate power and influence at all levels of government. It stands to reason that expanding the portion of the bar that is black or Spanish-surnamed will also increase the political impact of the community these new lawyers represent and from which they come." O'Neil, 1970 TOLEDO L. REV. at 299.

Finally, the law is a respected and highly visible profession. In a nation dedicated to the principle of equality under law, the presence in the profession of substantial numbers of minority group persons serves valuable additional functions. It shows that the principle of equality is not purely theoretical. It demonstrates to young members of minority groups that they have a real opportunity for advancement and for productive lives and to change that which is oppressive in our society through existing institutions.

III

THE UNIVERSITY OF WASHINGTON SCHOOL OF LAW'S AFFIRMATIVE ACTION PROGRAM FOR THE ADMISSION OF STUDENTS WHO ARE MEMBERS OF CONSTITUTIONALLY IDENTIFIABLE MINORITY GROUPS DOES NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF NON-MINORITY GROUP STUDENTS WHO ARE NOT ADMITTED TO THE LAW SCHOOL EVEN THOUGH THEIR STRICTLY ACADEMIC CREDENTIALS ARE SUPERIOR TO THOSE OF THE MINORITY GROUP STUDENTS.

The ultimate constitutional questions in this case can be stated in many forms. For our purposes, two will suffice: Does the Equal Protection Clause of the Fourteenth Amendment require that all governmental programs initiated by non-judicial agencies be "color blind"? Does consideration of race and ethnic background in attempts by non-judicial agencies of government to correct racial and ethnic inequalities and imbalances violate the Fourteenth Amendment? The answer to each of these questions is no.

The notion that the Constitution is "color blind" was initially put forward by the first Justice Harlan in his dissent in *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896), where he declared:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Justice Harlan was protesting, by his dissent, this Court's legitimization of racial segregation through adoption of the "separate but equal" test. Inadvertently, however, he laid the groundwork for the argu-

ments of those who oppose remedial or preferential treatment of minority group members, now that segregation has been declared unconstitutional, even though both the purpose and the effect of this treatment is to bring about both integration and a realistic equal opportunity for members of disadvantaged minority groups.

However, this Court has never declared that all racial distinctions and classifications are per se unconstitutional. At most the Court has ruled that they are "suspect," carry a "very heavy burden of justification," and are subject "to the most rigid scrutiny." *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Loving v. Virginia,* 388 U.S. 1, 9 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964). The Court has even studiously declined recent invitations by Justices Douglas and Stewart, concurring in the *Loving,* 388 U.S. at 13, and *McLaughlin,* 379 U.S. at 198, cases, to declare a *per se* rule of unconstitutionality when criminal sanctions are to be imposed on the basis of "the race of the actor."

We submit that there is a good reason for the Court's apparent reticence. Laws and practices which have the purpose and effect of continuing or increasing the burdens on members of racial and ethnic minority groups, that have been subjected to historic and pervasive discrimination, are unconstitutional. On the other hand, laws and practices which have the purpose and effect of promoting integration and true equality of opportunity for members of such minority groups are constitutional.

In approaching the question of whether a law violates the Equal Protection Clause, this Court has articulated a tripartite analysis:

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. [Citation omitted.] In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interested affected or the classification involved.

Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (footnote omitted).[31] Thus, where the basis for a classification is one that has been denominated by the Court to be "inherently suspect" or the individual interest affected is a "fundamental" constitutional right, the Court's standard of review is "exacting" (405 U.S. at 338) and "the Court must determine whether the exclusions are necessary to promote a compelling state interest" (405 U.S. at 437). Where the basis for the classification is not inherently "suspect" and the individual interest affected is not a "fundamental" constitutional right, the Court has held that ". . . the traditional standard of review . . . requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio*

[31]By "the character of the classification," the Court means "the basis for the classification," *e.g.*, recent interstate travel, race, national origin, alienage, sex. 405 U.S. at 335.

Independent School District v. Rodríguez, 93 S.Ct. 1278, 1301 (1973). *Cf. Dunn v. Blumstein*, 405 U.S. 330 (1972).

Although the *amici curiae* believe the Court was in error, a bare majority of the Court appears to have ruled that education is not a fundamental constitutional right, deprivation of which triggers the "exacting" "rigid scrutiny" standard. *San Antonio Independent School District v. Rodríguez, supra*, 93 S.Ct. at 1297-99; *id.*, 93 S.Ct. at 1311 (Stewart, J. concurring). At the very most, this majority conceded that ". . . some identifiable quantum of education . . . [might be] a constitutionally protected prerequisite to the meaningful exercise of . . . First Amendment freedoms and to intelligent utilization of the right to vote" 93 S.Ct. at 1298. Under that analysis, it is highly unlikely that enjoyment of a public legal education fits within the "identifiable quantum of education" that may enjoy the status of a "fundamental" constitutional right. Indeed, even if the Court were to recognize a broad constitutional right to public education, it is by no means clear that such a right would be so generous as to include a right to a graduate education.

Thus under the extant precedents, the only argument for applying the "exacting" tests, under the Equal Protection Clause, to the respondents' actions in the instant case is the argument that the "basis of the classification" affected by their program is inherently "suspect." We must, therefore, determine what is meant by an inherently "suspect" classification.

Given the historic purposes of the Fourteenth Amendment, the prime example of a "suspect" classification is one based upon race. *E.g., Brown v. Board of Education,* 347 U.S. 483 (1954); *McLaughlin v. Florida,* 379 U.S. 184 (1964). Other notable examples are national origin *(e.g., Oyama v. California,* 332 U.S. 633, 644-46 (1948)), alienage (*e.g., Graham v. Richardson,* 403 U.S. 365, 372 (1971)), indigency of a criminal defendant *(e.g., Griffin v. Illinois,* 351 U.S. 12 (1950)), and illegitimacy *(e.g., Gomez v. Perez,* 93 S.Ct. 872 (1973); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972)).

Although the respondents' admissions program creates a classification that is based upon race and national origin, it does not automatically follow that the respondents' actions are subject to the "exacting" test under the Equal Protection Clause. In fact several lines of the decision by this Court make it clear that the "exacting" test is inapplicable to the respondents' classification and actions.

In no decision that has come to the attention of *amici curiae* has this Court applied the "exacting" test where suit was not brought by or on behalf of members of groups that have been subject to historic and pervasive discrimination and deprivations. Obviously, the core purpose of the Equal Protection Clause was to affect a radical change in the status of the freedman, i.e., blacks. Consequently, governmental classifications *deemed* to be disadvantageous to blacks have always been subjected to "rigid scrutiny." Extension of this constitutional protection to

other racial minorities, such as orientals, followed as a matter of course. Members of such groups were, after all, subject to precisely the same kinds of discriminations and deprivations as were blacks. See, *e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); *Ho Ah Kow v. Nunan*, 12 Fed. Case. 252 (No. 6546) (C.D.C. Cal. 1879). Indeed, extension of the "exacting" test under the Equal Protection Clause to cases involving racial or national origin groups other than blacks turned very much on this Court's making a determination that, for example, ". . . Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment." *Keyes v. School Dist. No. 1, Denver*, 93 S.Ct. 2686, 2691 (1973). *Accord: Hernández v. Texas*, 347 U.S. 475 (1954). One of the predicates for this determination was the recognition ". . . that '[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination.'" *Keyes, supra*, 93 S.Ct. at 2692. *Accord: White v. Regester*, 93 S.Ct. 2332, 2340-41 (1973).

All other persons and groups that have heretofore received the protection of the strict scrutiny standard have also been members of such "identifiable class[es] for purposes of the Fourteenth Amendment." The members of each such class—whether it be defined by race, national origin, alienage, illegitimacy or indigency—share three notable characteristics. First its members have been subjected to historic and pervasive discrimination and deprivations. Second, especially when the classification is based upon race or lineage,

members of a suspect class share immutable characteristics that stigmatize them and set them apart from members of the majority group. See, *e.g.*, Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969); Comment, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. RIGHTS-CIV. LIBS. L. REV. 307, 348-59 (1972). Finally, within society in general, but especially in the political arena, they are relatively powerless. As Professor Wechsler has observed of the *Brown* decision: ". . . it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." H. Wechsler, *Toward Neutral Principles of Constitutional Law* in H. Wechsler, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW, 3, 45 (1961). Thus, each of these classes is ". . . a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products, Co.*, 304 U.S. 144, 152-53, n. 4 (1938) for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

Professor Wechsler, *id.*, at 45-46, feared that ". . . this position also presents problems." In particular he was concerned that such an approach forces a forbidden inquiry into the motive of the legislature. He also suggested that the actual impact of a racially motivated practice on a minority group member is too subjective a consideration upon which to base court judgments. Several of the *amici curiae* supporting

the petitioners echo these concerns. *E.g., Brief of the Anti-Defamation League of B'Nai B'rith Amicus Curiae* at 24. These fears are unrealistic.

First, adoption of our argument by no means requires that the Court determine the motive of the legislature. See, *e.g., Palmer v. Thompson,* 403 U.S. 217 (1971). Rather, the Court must evaluate the respondents' program on the basis of its actual or likely effects and the government's purpose in operating the program. See, *e.g., Jefferson v. Hackley,* 406 U.S. 535, 546-51 (1972). Legislative purpose is not the same as actual motive or intent. Purpose may possibly be gleaned from an actual formal statement of the legislative (or executive) body; clearly it is inferrable from a program's form, operations or its effects. See, *e.g. Keyes v. School Dist. No. 1, Denver,* 93 S.Ct. 2686 (1973); *cf., Monroe v. Pape,* 365 U.S. 167 (1961).

Second, the concern shown by Professor Wechsler and the *amici curiae* in support of the petitioners, that the subjective effect of respondents' programs on minority group members may well be negative, is also unavailing. We agree that the effects with which the Court must be concerned include subjective and psychological effects. Indeed, at the heart of the issue of effects may well be what Edmond Cahn labeled as the "consumer perspective." Cahn, *Law in the Consumer Perspective,* 112 U. Pa. L. Rev. 1 (1963); E. Cahn, THE PREDICAMENT OF DEMOCRATIC MAN (1961). The consumer perspective simply means that the most valid judgment which can be given about institutions is given by those people they are intended to serve—

i.e., the "consumer" of that institution's services; in the instant case students who are members of minority groups.

It does not follow that Professor Wechsler is correct when he states that there is ". . . a point in *Plessy* '[*v. Ferguson,* 163 U.S. 537, 551 (1896)] in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it.'" H. Wechsler, *supra,* at 46. The perceptions of the minority group "consumers" do not originate in an act of will on their part, nor are they unrelated to the purposes and the perceptions of the majority group. See Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L. J. 421 (1960). Further, in the context of the instant case, it is perverse to suggest, based only upon scant literary statement, that affirmative action admissions programs, such as that of the respondents, actually "stigmatizes" the programs' beneficiaries. See *Brief of the Anti-Defamation League of B'nai B'rith Amicus Curiae* at 24. The facts marshaled, *supra,* under Point II of this brief, show the respondents' program is designed to remedy gross deprivations of "discrete and insular" minorities. That both the actual and subjective effect is likely to be consistent with that design, is clear. More than this a court should not require. *Cf.*, Black, *The Lawfulness of the Segregation Decisions, supra.*

Nothing in any decision of this Court suggests that a racial or national origin classification is subject to

the "rigid scrutiny" standard when its benefits are bestowed upon the members of an "identifiable class for purposes of the Fourteenth Amendment," or its deleterious effects are neither intended to nor in fact fall upon the members of such a "discrete and insular" minority. *Cf., e.g., McDaniel v. Barresi,* 402 U.S. 39 (1971). Judicial precedent and common sense indicate to the contrary.

First, this Court has itself specifically fashioned and legitimated race conscious remedies designed to eliminate or ameliorate the historic and pervasive effects of racial discrimination. See, *e.g., Swann v. Charlotte-Mecklenburg Board of Educ.,* 402 U.S. 1 (1971). In enforcing federal laws against racial and national origin discrimination in employment, half of the United States Courts of Appeals have validated or directed preferential hiring and promotion remedies. At least two Courts of Appeals have specifically validated affirmative action preferential hiring programs imposed by non-judicial bodies. *Associated General Contractors v. Altshuler,* ..... F.2d ....., 6 FEP Cases 1031 (1st Cir. Nov. 30, 1973); *Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971).

Several of the *amici curiae* supporting the petitioners have argued that these precedents are inapposite because they "are characterized by judicial findings of specific prior discriminatory acts by the particular institution or employer involved." *Brief of the American Jewish Congress, Amicus Curiae, in Support of*

the Petitioners, p. 18. *Accord: Brief of the Anti-Defamation League of B'Nai B'rith Amicus Curiae.*[32] We know of no principle of constitutional law from which one might conclude that application of the "exacting" standard of review under the Equal Protection Clause is appropriate when a particular institution voluntarily embarks on an affirmative action program. *Cf. e.g., McDaniel v. Barresi*, 402 U.S. 39 (1971). If the university must first prove that it discriminated a glaring anomaly results. A university adjudicated to be a discriminator could be compelled to participate in affirmative action, while an equally guilty university, seeking either to avoid litigation or to right a wrong, could not voluntarily operate an affirmative action program unless it was prepared to demonstrate or confess that it had discriminated.[33] When a non-judicial governmental agency decides to take steps to eliminate or ameliorate the effects of racism in our society, it makes no more sense to require it to demonstrate that the specific activities or institutions subject to its regulation have actually been guilty of racism than it would have been for this Court to have required that the Department of

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[32]Notably, the *Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae*, pp. 19-24, takes the position that the remedies imposed or validated in these employment cases are unlawful.

[33]That the Record in this case reflects no evidence of overt discrimination by the University of Washington School of Law by no means proves that it did not have a history of discrimination nor that the traditional academic admissions criteria are both valid and free from cultural bias. The case was, after all, defended by the University's attorneys.

Agriculture justify the second Agricultural Adjustment Act by demonstrating that one small farmer's home-consumed wheat would itself have affected the supply-demand curve for wheat. Compare *Wickard v. Filburn,* 317 U.S. 111 (1942).

This Court has specifically ruled that "§ 5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966). When Congress exercises that power, or the similar powers granted to it under the Thirteenth[34] and Fifteenth Amendments,[35] this Court has instructed that judicial review is severely limited to a determination of whether the legislation is appropriate ". . . to enforce the Equal Protection Clause, that is, under the M'Culloch v. Maryland [17 U.S. 4, Wheat 316, 421 (1819)] standard, whether . . . [the statute] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'letter and spirit of the Constitution.'" 384 U.S. at 651.

In applying this standard of review, the Court sustained the constitutionality of § 4(e) of the Voting Rights Act of 1965, which in effect singles out Puerto

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[34] *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 443-44 (1968).
[35] *South Carolina v. Katzenbach,* 383 U.S. 301, 326 (1966).

Ricans as a class and ". . . provides that no person who has successfully completed the sixth primary grade in public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English." 384 U.S. at 643. If petitioners' view of the Equal Protection Clause is accepted by this Court, it may well be called upon to decide, in a new lawsuit brought by Anglos, whether, by diluting the vote of non-Puerto Ricans in New York, Congress' enfranchisement of Puerto Ricans not literate in English can survive "exacting" review under the Equal Protection Clause.

Similarly, the purpose and effect of the federal government's requirement that the public schools of the states provide bilingual instruction to children who are not literate in English grants an advantage to members of "identifiable groups for purposes of the Fourteenth Amendment," *i.e.*, aliens and members of certain national origin groups. This requirement has been validated by the Court in *Lau v. Nichols*, ... U.S. ....., 42 U.S. L. WEEK 4165 (No. 72-6520, Jan. 21, 1974). If the Court were to adopt petitioners' view of the Equal Protection Clause, it might well have to decide whether Anglo children who are literate in English are entitled to a judicial reevaluation of the federal requirement under the "strict scrutiny" standard, on the ground that re-allocation of educational resources to bilingual programs has denied

them equal educational opportunity.[36] Quite similar arguments were made by white parents and school children in their vain efforts to circumvent this Court's decision in *Brown*. See *e.g., McDaniel v. Barresi,* 402 U.S. 39 (1971). Adoption of the petitioners' view of the Equal Protection Clause would now give credit to such arguments; for this Court has ruled that "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. . . . ." *Katzenbach v. Morgan,* 384 U.S. at 651 n. 10 (1966). Notably, in *Lau, supra,* this Court implicitly validated VI of the Civil Rights Act of 1964, on the basis of which the Department of Health, Education and Welfare has promulgated regulations requiring universities to operate affirmative action programs like that of the respondents, 45 C.F.R. Part 80, § 80.3(b)(6).

We submit that in passing upon the validity of governmental programs that have both the purpose and the effect of providing an advantage to members of "identifiable class[es] for purposes of the Fourteenth Amendment," the courts are obligated to apply only the traditional test under the Equal Protection Clause. They must determine only whether "the benign classifications described are at least rationally related to achieving that purpose." Comment, *Devel-*

[36]Equally "suspect" would be myriad other federal and state programs designed and operated to redress the effects of racism, for example, the federal government's programs for special loans and services to minority business enterprises.

opments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1107 (1969). For this Court's latest application of the traditional standard, see, *Marshall v. United States*, 42 U.S.L.W. 4121 (U.S. No. 72-5881, Jan. 9, 1974).

If the test to be applied is the traditional equal protection test of demonstrating that the given classification bears a reasonable relationship to a legitimate governmental interest, an affirmative action minority group admission and training program, such as the one operated by the University of Washington School of Law, is clearly constitutional. Both the purpose and the effect of the program is to benefit members of minority groups that have been subject to historic and pervasive discrimination and deprivations. The program follows a reasonable design and its operation is related to fulfillment of that legitimate governmental purpose. Hence the program is constitutional, even though its operation may exclude non-minority group persons from a government benefit apparently on the ground of race or national origin.

Even if the more "exacting" test of equal protection is applied, the purpose, design and effect of the respondents' program overcomes "the inherently suspect" quality of the racial classification. In this respect, the decision of the court below was clearly correct. It is too late in the day to suggest otherwise. See, *e.g.*, Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV., *supra*, at 1087-91; Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV.

1063, 1071-73 (1968). See Points I and II of this brief, *supra,* for our arguments, and their factual underpinnings, on this issue.

The United States Court of Appeals for the Second Circuit has articulated the proper interpretation of Justice Harlan's "color blind" *dictum.* In an opinion by Judge Smith, that Court declared that government urban renewal agencies are under a special obligation to provide adequate replacement housing for minority group members displaced by renewal projects. Judge Smith specifically observed:

> What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968).

CONCLUSION

For the reasons stated in this brief, as well as reasons stated in the other briefs in support of the respondents, we submit that the decision of the court below should be ~~reversed~~ affirmed.

Dated, February, 1974.

Respectfully submitted,

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(Appendices Follow)

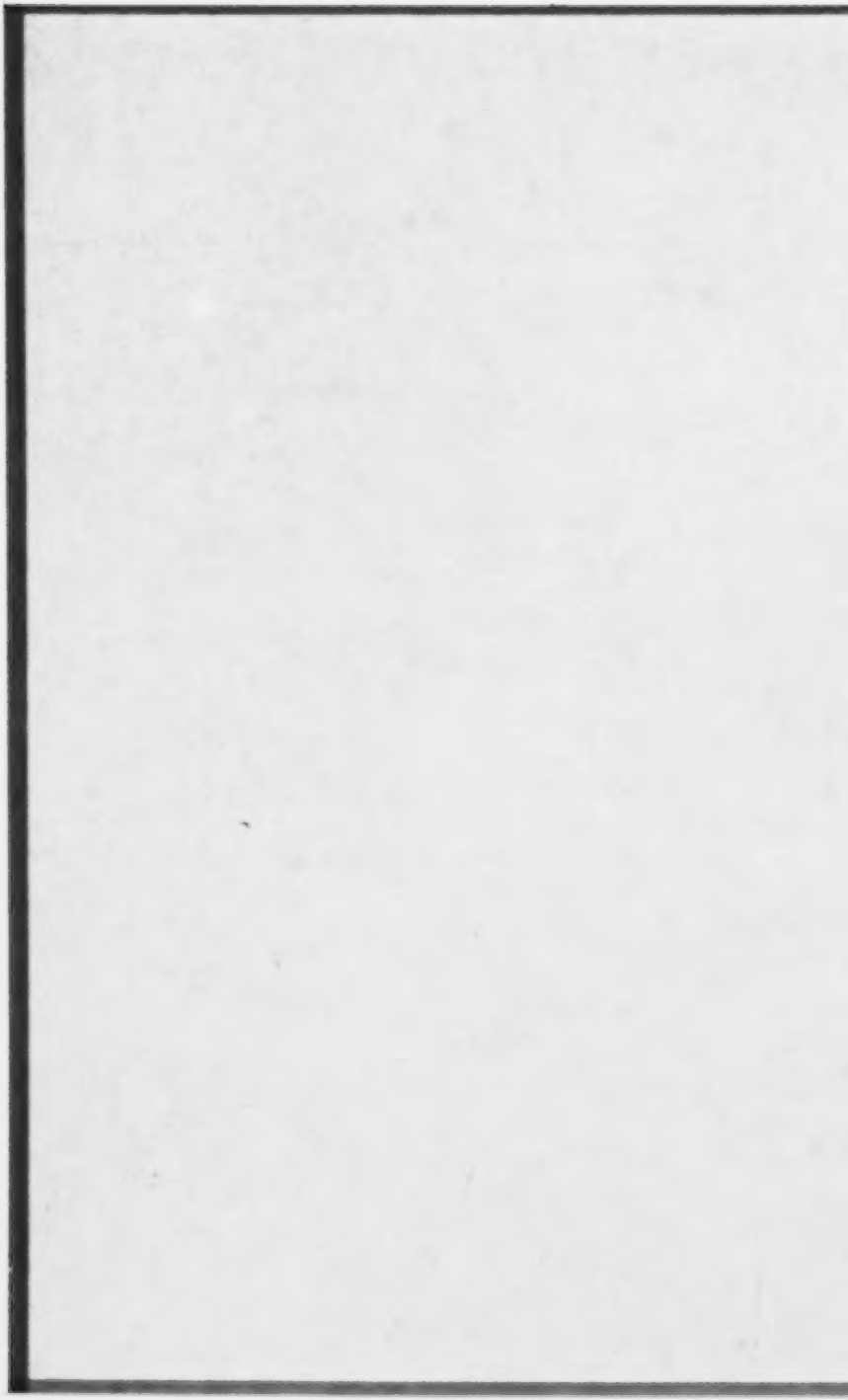
Appendix A

1973 SURVEY OF MINORITY GROUP STUDENTS IN LEGAL EDUCATION

Amended Copy--12/19/73

TABLE 1. MINORITY STUDENTS ENROLLED IN APPROVED LAW SCHOOLS

		1st year	2nd year	3rd year	4th year	Year Not Stated	TOTAL
BLACK AMERICAN	1973-74	1,943	1,443	1,207	101	123	4,817
	1972-73	1,907	1,324	1,106	74	12	4,423
	1971-72	1,716	1,147	761	55	65	3,744
	1969-70	1,115	574	395	44	--	2,128
CHICANO (MEXICAN-AMERICAN)	1973-74	539	386	271	63	0	1,259
	1972-73	480	337	238	17	0	1,072
	1971-72	403	262	170	11	37	883
	1969-70	245	113	54	0	--	412
PUERTO RICAN	1973-74	96	47	32	5	0	180
	1972-73	73	40	25	5	0	143
	1971-72	49	25	18	2	0	94
	1969-70	29	14	13	5	--	61
OTHER HISPANO AMERICAN	1973-74	94	70	59	4	34	261
	1972-73	96	72	60	3	0	231
	1971-72	74	62	35	3	5	179
	1969-70	35	18	19	3	--	75
AMERICAN INDIAN	1973-74	109	65	44	3	1	222
	1972-73	79	48	44	2	0	173
	1971-72	71	46	18	2	3	140
	1969-70	44	17	10	1	--	72
ASIAN AMERICAN	1973-74	327	~~296~~ 297	202	19	5	~~849~~ 850
	1972-73	298	218	144	20	1	681
	1971-72	254	142	72	7	5	480
OTHER	1969-70	84	55	42	4	--	185
GROUP NOT STATED	1973-74	6	~~6~~ 5	1	0	0	~~13~~ 12
	1972-73	1	2	2	2	0	7
	1971-72	0	23	25	0	0	48
TOTAL MINORITY GROUP STUDENTS	1973-74	3,114	2,313	1,816	195	163	7,601
	1972-73	2,934	2,041	1,619	123	13	6,730
	1971-72	2,567	1,707	1,099	80	115	5,568
	1969-70	1,552	791	533	57	--	2,933



Appendix B

LEGAL EDUCATION AND BAR ADMISSION STATISTICS

1963-1973

Year	Total	Enrollment Women	First Year	LSAT Candidates	J.D. or LL.B. Awarded	New Admissions to the Bar
1963	49,552	1,383	20,776	30,528	9,638	10,738
1964	54,265	2,183	22,753	37,598	10,191	12,023
1965	59,744	2,537	24,167	39,406	11,507	13,109
1966	62,556	2,678	24,077	44,905	13,113	14,614
1967	64,406	2,906	24,267	47,110	14,738	16,007
1968	62,779	3,704	23,652	49,756	16,977	17,764
1969	68,386	4,715	29,128	59,050	16,733	19,123
1970	82,499	7,031	34,713	74,092	17,183	17,922
1971	94,468	8,914	36,171	107,479	17,006	20,485
1972	101,707	12,173	35,131	119,694	22,342	25,086
1973	106,102	16,760	37,018	121,262	27,756	

NOTES: Enrollment is that in American Bar Association approved school as of October 1. The LSAT candidate volume is given for the test year ending in the year stated. Thus, 121,262 administrations of the LSAT occurred in the test year July, 1972, through April, 1973. J.D. or LL.B. degrees are those awarded by approved schools for the academic year ending in the year stated. Thus, 27,756 degrees were awarded in the year beginning with the fall, 1972 term and ending with the summer, 1973 term. Total new admissions to the Bar are for the 1972 calendar year and include those admitted by office study, diploma privilege, and examination and study at an unapproved law school; the great bulk of those admitted were graduated from approved schools.